

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 9

SARA LEE BAKERY GROUP D/B/A  
HEINER'S BAKERY <sup>1/</sup>

Employer

and

Case 9-RC-18109

RETAIL, WHOLESALE AND DEPARTMENT  
STORE UNION LOCAL 21, UNITED FOOD AND  
COMMERCIAL WORKERS UNION

Petitioner

**REGIONAL DIRECTOR'S DECISION AND**  
**DIRECTION OF ELECTION**

**I. INTRODUCTION**

The Employer, a corporation, operates a bakery in Huntington, West Virginia which sells bread and related products through various distribution centers or depots and "thrift" stores located in Huntington and Beckley, West Virginia and in Gallipolis and Athens/The Plains, Ohio. The Petitioner filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent all full-time and part-time thrift store clerks and lead persons. There are approximately seven employees in the unit sought by the Petitioner. The Employer, contrary to the Petitioner, contends that the lead persons or lead retail clerks (LRCs) are supervisors within the meaning of Section 2(11) of the Act and should be excluded from the unit. Specifically, the Employer argues that the LRCs use independent judgment to direct clerks by scheduling their work hours, that the LRCs hire part-time clerks, and that the LRCs effectively recommend the discipline of employees by documenting and monitoring the attendance and job performance of clerks. The Petitioner has expressed its willingness to proceed to an election in any unit found appropriate.

I have carefully reviewed and considered the record evidence and the arguments of the parties at the hearing and in their post-hearing briefs. I find that the Employer has not met its burden of establishing that the lead persons/lead retail clerks are supervisors within the meaning of the Act. In support of my conclusion, I will first set forth the relevant facts and then discuss and apply the applicable law to these facts.

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<sup>1/</sup> The name of the Employer appears as amended at the hearing.

## II. FACTS

The Employer operates a bakery and office located in Huntington, West Virginia where it also maintains a warehouse or depot from which route sales drivers picked up bread products for delivery to retail grocery stores. The Employer also has warehouse/depots located at Gallipolis, Ohio, The Plains, Ohio, (near Athens) and Daniels, West Virginia (near Beckley). The bakery and the three other depots each have affiliated retail thrift stores.

Bread from the bakery is delivered to each depot by truck on a daily basis. From the depot, the bread is transferred to local delivery trucks for delivery to nearby retail stores. The delivery drivers remove dated or “stale” bread from the shelves and return it to the depot so it can be made available for sale in retail thrift stores. If the bread is not sold at a thrift store within a designated time period, the bread is discarded or used as animal feed. The Huntington thrift store is located across the street from the bakery and the remaining thrift stores share buildings with the depot operations. Each depot is under the supervision of a district manager who oversees the delivery drivers and the physical building.

The Huntington thrift store is staffed by a full-time lead retail clerk (LRC), working 40 hours a week, two part-time retail clerks who work 29 hours a week and a full-time clerk. The full-time clerk is a member of the bakery bargaining unit, and primarily works in the storeroom unloading trucks and preparing and selling out-of-date product as animal feed. <sup>2/</sup> The remaining three thrift stores are each staffed by one full-time lead retail clerk and one part-time retail clerk. The part-time position in Gallipolis is presently vacant.

Zone Retail Sales Manager Karen Basham is responsible for the operations of the 4 retail thrift stores and oversees 20 retail stores, including the 4 thrift stores involved in this proceeding, from her office in Louisville, Kentucky. Until early 2005, the district manager at each depot was responsible for the thrift store operations at that depot, but they are presently under a different line of supervision and the retail store clerks now report to Basham.

The retail bakery thrift stores were established to give the Employer an outlet for its day-old or “stale” bread, which can no longer be sold as fresh at retail grocery stores. The stores also sell soft drinks, snacks, cookies and baked goods which are supplied by outside vendors. The thrift store hours of operation are established by Basham, the retail sales manager: normal store hours are from 9 a.m. to 6 p.m., Monday through Friday with shorter hours on Saturday. All four stores are closed on Sunday. Anita McElfresh is the LRC at the Gallipolis facility, Karen Sparks is LRC at the Huntington store, Joanna Stufflebean is the LRC at the The Plains store, and Antoinette Hatcher is the LRC at the Daniels store.

### Hiring:

Job applications for sales positions, retail route drivers and other jobs are sometimes kept at the retail thrift store counters and supplied to applicants by the clerk on duty. Prior to Basham’s assumption of zone retail store management functions for the thrift stores, the retail

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<sup>2/</sup> There is no contention that this full-time clerk should be included in the petitioned-for bargaining unit.

store clerks were hired by the district manager at each depot. Although Basham testified that the LRCs are involved in the hiring process, the record evidence with respect to hiring is inconclusive regarding the LRCs' role in the process. The record shows that Basham asks the LRCs whether they "liked" an applicant, then instructs the LRC to fax the application, with a copy of the applicant's driver's license and social security number, to Paula Adkins at the Employer's Huntington Human Resources office. There was no evidence that the LRCs had been instructed to obtain any information from the applicants other than a copy of the driver's license and social security number. The LRCs do not ask any questions of the applicant regarding their qualifications nor do they review the completed application. The record shows that the LRC may explain the job duties to the applicant while stocking shelves and waiting on customers. The Employer did not provide any evidence about the role of the Human Resources office in hiring decisions.

The LRCs have called Basham to ask for instructions concerning completed applications and both LRCs and part-time clerks have spoken to applicants to explain the job duties and respond to questions. The LRCs do not make an express recommendation as whether to hire a clerk, but they may be asked for their impression of the applicant.

The evidence regarding the role an LRC plays in hiring is contradictory. Thus, LRC McElfresh testified that about 6 months ago, she asked Basham to hire an applicant, Melissa White, but Basham refused to do so because of White's appearance in her driver's license photo. However, Basham claimed that McElfresh forwarded the application and drivers license but told Basham that she did not "really think that this is the image we want to portray for the company." White was not hired. After applications are faxed to Paula Adkins, the Huntington Human Resources office arranges for drug tests, background checks and orientation.

The record establishes that the most recently hired clerk at the Huntington store was interviewed by Basham, (apparently at her office) and then sent to the thrift store to speak to the clerks, LRC Karen Sparks and the part-time retail clerk Carol Stevens. Sparks and Stevens explained the job to the applicant while they continued to work. Basham subsequently called and asked both Sparks and Stevens for their impressions concerning the applicant.

The record reflects that when needed, the Employer utilizes temporary employees to staff the thrift stores. Although Basham indicated that LRCs had authority to call the local Kelly Temporary Service offices for help as needed, there is no evidence that a LRC has the independent authority to obtain temporary help or had ever called for a temporary employee without prior approval from Basham. LRC McElfresh testified that every time she needed a temporary employee, she first called Basham. McElfresh further testified that on one occasion, she contacted the Kelly temporary service to say that the employee they had sent was not working out and they then sent someone else, but there is no evidence that LRC McElfresh asked for the temporary employee to be removed or reassigned.

#### Scheduling of Employees:

As previously noted, the hours each thrift store is open are set by Basham. All of the LRCs are full time and work 40 hours per week and the part-time clerks are all scheduled for

29 hours a week. <sup>3/</sup> LRC McElfresh testified that she was told to choose the hours she wanted and assign the remaining hours to the part-time clerk. On occasion when LRC McElfresh works overtime, she obtains Basham's permission and the changes in her thrift store's schedule are always approved by Basham. LRC Sparks and clerk Stevens worked together to prepare a schedule at the Huntington store and fax it to Basham for approval. When Sparks added the newest part-time clerk to the schedule, she worked with him to accommodate the hours on his other job. When Basham questioned the schedule, LRC Sparks explained that the hours were the preference of the newest clerk. LRC Stufflebean testified she had been required by Basham to schedule herself for Saturdays because the Kelly temporary employee who was filling in for her regular part-time clerk was unwilling to work weekends. Once a store's schedule has been set, it does not normally change.

### III. ANALYSIS

The sole issue before me is the supervisory status of the LRCs. Before analyzing their specific duties and authority, I will review the requirements for establishing supervisory status. Section 2(11) of the Act defines the term supervisor as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

To meet the definition of a supervisor set forth in Section 2(11) of the Act, a person needs to possess only one of the 12 specific criteria listed, or the authority to effectively recommend such action. *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6<sup>th</sup> Cir. 1949), cert. denied, 338 U.S. 899 (1949). The exercise of that authority, however, must involve the use of independent judgment. *Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000). Thus, the exercise of "supervisory authority" in merely a routine, clerical, perfunctory or sporadic manner does not confer supervisory status. *Chrome Deposit Corp.*, 323 NLRB 961, 963 (1997); *Feralloy West Corp. and Pohng Steel America*, 277 NLRB 1083, 1084 (1985).

Possession of authority consistent with any of the indicia of Section 2(11) is sufficient to establish supervisory status, even if this authority has not yet been exercised. See, e.g., *Pepsi-Cola Co.*, 327 NLRB 1062, 1063 (1999); *Fred Meyer Alaska*, 334 NLRB 646, 649 at fn. 8 (2001). The absence of evidence that such authority has been exercised may, however, be probative of whether such authority exists. See, *Michigan Masonic Home*, 332 NLRB 1409, 1410 (2000); *Chevron U.S.A.*, 308 NLRB 59, 61 (1992).

In considering whether the LRCs involved here possess any of the supervisory authority set forth in Section 2(11) of the Act, I am mindful that in enacting this section of the Act,

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<sup>3/</sup> However, certain LRCs have been required to work over 40 hours when the part-time clerk position was vacant.

Congress emphasized its intention that only supervisory personnel vested with “genuine management prerogatives” should be considered supervisors, and not “straw bosses, leadmen, set-up men and other minor supervisory employees.” *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985). Thus, the ability to give “some instructions or minor orders to other employees” does not confer supervisory status. *Id.* at 1689. Such “minor supervisory duties” do not deprive such individuals of the benefits of the Act. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-281 (1974), quoting Sen. Rep. No. 105, 80<sup>th</sup> Cong. 1<sup>st</sup> Sess., at 4. In this regard, the Board has frequently warned against construing supervisory status too broadly because an individual deemed to be a supervisor loses the protection of the Act. See, e.g., *Vencor Hospital – Los Angeles*, 328 NLRB 1136, 1138 (1999); *Bozeman Deaconess Hospital*, 322 NLRB 1107, 1114 (1997).

Proving supervisory status is the burden of the party asserting that such status exists. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-712 (2001); *Arlington Masonry Supply*, 339 NLRB 817, 818 (2003); *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003). As a general matter, I note that for a party to satisfy the burden of proving supervisory status, it must do so by “a preponderance of the credible evidence.” *Dean & Deluca*, supra at 1047; *Star Trek: The Experience*, 334 NLRB 246, 251 (2001). The preponderance of the evidence standard requires the trier of fact “to believe that the existence of a fact is more probable than its non-existence before [he] may find in favor of the party who has the burden to persuade the [trier] of the fact’s existence.” *In re Winship*, 397 U.S. 358, 371-372 (1970). Accordingly, any lack of evidence in the record is construed against the party asserting supervisory status. See, *Williamette Industries, Inc.*, 336 NLRB 743 (2001); *Michigan Masonic Home*, 332 NLRB at 1409. Moreover, “[w]henver the evidence is in conflict or otherwise inconclusive on a particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia.” *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Consequently, mere inferences or conclusionary statements without detailed specific evidence of independent judgment are insufficient to establish supervisory status. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991).

The Board recently revisited the issue of supervisory status in *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006), in light of the Supreme Court’s finding in *Kentucky River*. See also, *Croft Metals, Inc.*, 348 NLRB No. 38 (September 29, 2006) and *Goldencrest Healthcare Center*, 348 NLRB No. 39 (September 29, 2006), issued at the same time as *Oakwood*. In *Oakwood*, the Board addressed the Supreme Court’s rejection of the Board’s interpretation of Section 2(11) in the healthcare industry as being overly narrow and adopted “definitions for the term ‘assign,’ ‘responsibly to direct,’ and ‘independent judgment’ as those terms are used in Section 2(11) of the Act.” *Oakwood*, supra, slip op. at 3.

With regard to the Section 2(11) criterion “assign,” the Board considered that this factor shares with other Section 2(11) criteria the “common trait of affecting a term or condition of employment” and determined to construe the term “assign” “to refer to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.” *Id.* slip op. at 4. The Board reasoned that, “It follows that the decision or effective recommendation to affect one of these – place, time, or overall tasks – can be a supervisory

function.” Id. The Board clarified that, “. . . choosing the order in which the employee will perform discrete tasks within those assignments (e.g., restocking toasters before coffeemakers) would not be indicative of exercising the authority to ‘assign.’” Id.

The Board sought to define the parameters of the term “responsibly to direct” by adopting the definition established by the Fifth Circuit in *NLRB v. KDFW-TV, Inc.*, 790 F.2d 1273, (5<sup>th</sup> Cir. 1986):

To be responsible is to be answerable for the discharge of a duty or obligation . . . . In determining whether “direction” in any particular case is responsible, the focus is on whether the alleged supervisor is “held fully accountable and responsible for the performance and work product of the employees” he directs . . . . Thus in *NLRB v. Adam [&] Eve Cosmetics, Inc.*, 567 F.2d 723, 727 (7<sup>th</sup> Cir. 1977), for example, the court reversed a Board finding that an employee lacked supervisory status after finding that the employee had been reprimanded for the performance of others in his Department. (At 1278).

*Oakwood*, slip op. at 6 – 7. In agreeing with the circuit courts that have considered the issue, the Board found that “for direction to be ‘responsible,’ the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employees are not performed properly.” In clarifying the accountability element for “responsibly to direct” the Board noted that, “to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.” Id, at 7.

In *Kentucky River*, the Supreme Court rejected the Board’s interpretation of “independent judgment” to exclude the exercise of “ordinary professional or technical judgment in directing less skilled employees to deliver services.” *NLRB v. Kentucky River Medical Center, Inc.*, 532 U.S. at 713. Following the admonitions of the Supreme Court, the Board in *Oakwood* adopted an interpretation of the term “independent judgment” that “applies irrespective of the Section 2(11) supervisory function implicated, and without regard to whether the judgment is exercised using professional or technical expertise . . . professional or technical judgments involving the use of independent judgment are supervisory if they involve one of the 12 supervisory functions of Section 2(11).” Supra, slip op. at 7. The Board noted that the term “independent judgment” must be interpreted in contrast with the statutory language, “of a merely routine or clerical nature.” Id, slip op. at 8. Consistent with the view of the Supreme Court, the Board held that, “a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.” Id. (citation omitted) However, “. . . the mere

existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices.” Id.

With respect to the supervisory status of the LRCs, I have examined the record in light of the precedent discussed above and I find that none of these individuals are supervisors within the meaning of Section 2(11) of the Act. First, I note that there is no contention or evidence that any of the LRCs have the authority in the interest of the Employer to transfer, suspend, lay off, recall, promote, discharge, reward, adjust employees’ grievances, or effectively to recommend such action. Next, I turn to a consideration of whether the LRCs’ documentation and monitoring role, as well as their participation in the hiring process and their assignment or scheduling of work, being mindful of the Supreme Court’s admonitions in *Kentucky River* and the Board’s recent decisions defining these terms, as well as the term “independent judgment,” warrants the conclusion that they are supervisors within the meaning of the Act.

#### Documentation and Monitoring of Attendance and Job Performance of Part-Time Clerks:

The authority to discipline must be established by a showing that the disputed individuals’ participation in the disciplinary process leads to a personnel action without independent review or investigation by other managerial or supervisory personnel. *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002), citing *Beverly Health & Rehabilitation Services, Inc.*, 335 NLRB 635 (2001). Thus, the Board has repeatedly held that the mere exercise of a reporting function that does not automatically lead to further discipline or adverse action against an employee does not establish supervisory authority. See, *Illinois Veterans Home At Anna L. P.*, 323 NLRB 890 (1997); *Ten Broeck Commons*, 320 NLRB 806, at 812 (1996).

The record evidence indicating that the only role in discipline played by the LRCs is documenting misconduct and reporting it to management. The record shows that LRC Sparks first documented misconduct by bakery unit store clerk Clinton Carey when Sparks was a part-time clerk. While LRC Sparks later signed as a witness to written job performance standards expected of Carey, there was no evidence that she reprimanded him for failing to meeting expectations. Rather, she again documented his actions and Basham issued the discipline. Sparks was not present at Carey’s disciplinary meetings and made no recommendations. When The Plains LRC Stufflean complained to Basham about the performance of her part-time clerk, she was told to document the misconduct and report it to Basham. LRC Stufflean did not make any recommendation regarding discipline and there was no evidence that the clerk, who was on sick leave at the time of the hearing, had ever been reprimanded.

Based on the foregoing and the entire record, I find that the Employer has failed to establish that the LRCs possess supervisory authority to discipline employees or to effectively recommend discipline at most, the testimony reflects that LRCs merely monitor attendance and job performances.

#### Assignment (Scheduling):

I turn now to a consideration of the role played by the LRCs in the assignment or scheduling of work. In *Oakwood*, the Board defined assignment as the act of designating an

employee to a place, appointing an employee to a time, or giving significant overall tasks. *Oakwood*, supra, slip op. at 4. The record establishes that the LRCs are involved in preparing weekly staffing schedules for stores. However, the schedules are arranged jointly among the LRCs and part-time clerks, taking into account the personal preferences and availability of all clerks. They are submitted to Basham for approval and any significant changes are also subject to Basham's approval. LRCs do not change the number of hours worked by any clerks. The LRCs are instructed to ensure that the store is staffed, but there is no evidence that the LRCs exercise independent judgment in the interest of the Employer when preparing schedules.

The cases cited by the Employer in support of its position are distinguishable on their facts. Thus, in *San Benito Health Foundation*, 318 NLRB 299 (1995), the Board found an individual to be a supervisor because he independently prepared annual evaluations used for raises, granted time off and approved employee time cards. In *Market Place, Inc.*, 304 NLRB 995 (1991), the Board found the individual to be a supervisor because he scheduled employees, assigned work, authorized overtime, handled employees' problems on his own and attended management meetings. In *Heck's, Inc.*, 277 NLRB 916 (1985), the administrative law judge found that the alleged supervisor used independent judgment to assign and delegate work, schedule employees' hours, work days, and vacations. Finally, the Employer relies on *Sewall-Allen Big Star, Inc.*, 294 NLRB 312 (1989). In that case, the supervisor prepared work schedules and assigned overtime to employees, approved vacation requests, inspected employees' work, and granted employees time off. There is no evidence that the LRCs have the discretion or authority described in any of these cases. The LRCs cannot affect the numbers of hours any employee works and it is clear from the record that any changes in the schedule are arrived at for the mutual convenience of all store employees and these changes are subject to Basham's approval.

As there is no probative evidence that the LRCs schedule employees utilizing independent judgment, I find that the Employer has failed to establish that LRCs possess supervisory authority on this basis.

#### Hiring:

The ability to hire or recommend hiring confers 2(11) status when it is exercised with independent judgment on behalf of management and not in a routine manner. See, *Boune of Houston*, 280 NLRB 1222, 1223 (1986). Recommending an applicant for hire contemplates more than the mere screening of applications or other ministerial participation in the interview and hiring process. *Id.* at 1225. An individual who merely advises management about the experience of an applicant does not make hiring decisions or effectively recommend hiring where management also interviews the applicants and has final hiring authority. See also, *The Door*, 297 NLRB 601 (1990). The only testimony concerning the role of the LRCs in hiring shows that they exercise a ministerial role with regard to providing applications and explaining the job for which prospective employees are applying. Although the LRCs have been asked whether they "liked" an applicant, the evidence that LRCs provided any other input is inconclusive. Basham testified that LRC McElfresh pointed out deficiencies in applicant Melissa Miles' appearance, but LRC McElfresh stated that she told Basham that Miles looked nice when she came in to fill out her application, unlike her appearance in her driver's license



photo. The remaining evidence indicates that the LRCs exercise a ministerial role with respect to hiring and have no authority to make hiring decisions nor do they have the authority to effectively recommend the hiring of an employee.

I have reviewed the cases cited by the Employer in its brief in support for its position that the LRCs are supervisors based on their participation in the hiring process. I find those cases cited by the Employer are distinguishable on their facts.

Thus, in *Overley Electric Co.*, 319 NLRB 1232 (1995), cited by the Employer, the Board found the alleged supervisor there, unlike the LRCs here, had the authority to hire and exercised independent judgment in doing so. In *United Electrical and Mechanical, Inc.*, 279 NLRB 209 (1986), the lead person provided applications to job seekers. However, unlike the LRCs, they also questioned applicants about their experience and exercised independent judgment when they told applicants they were hired, and gave applicants their pay rate and reporting day and time. He also gave work assignments and directed a construction crew of 16 to 20 employees. In *Davis and Davis d/b/a Holiday Inn of Victorville*, 284 NLRB 916 (1987), the alleged supervisor, a salaried lead chef, not only interviewed applicants but, unlike the LRCs here, also independently supervised the entire food preparation department, directed work, prepared work schedules, called in part-time employees, authorized overtime, and trained food and beverage personnel. In *Pittsburgh Metal Processing Co.*, 286 NLRB 734 (1987), the supervisor was salaried, attended supervisors' meetings, formulated production policy, pledged the employer's credit and received much higher pay than other employees, in addition to interviewing job applicants and recommending the hiring and rejection of a job applicant. In the instant case, the testimony concerning the LRCs' ability to hire or reject applicants is contradictory and inconclusive. LRC Sparks and McElfresh have interviewed applicants but their interviews consisted only of explaining the duties of a store clerk job to the applicant. Retail Sales Manager Basham contended that the lead retail clerks had authority to hire and that they would recommend an applicant by faxing a copy of the applicant's driver's license and social security number with the job application. However, there is no evidence that any LRCs has been told that he/she was authorized to hire employees or that sending in the above documents indicated a recommendation for hire. Additionally, the testimony is contradictory concerning whether McElfresh rejected applicant Melissa Miles or recommended that Basham hire her.

Based on the foregoing and the entire record, I conclude that the participation of the LRCs in the hiring of part-time clerks is nothing more than a routine or clerical function. Further, any clerk may be asked to give a recommendation regarding an applicant. In fact, in Huntington, the part-time clerk was asked for an opinion about an applicant at the same time as the LRC, and there is no evidence that the recommendation were treated differently.

#### **IV. CONCLUSION**

Based on the foregoing and the entire record, I conclude and find as follows:

1. The hearing officer's rulings at the hearing are free of prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction.
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
4. The Petitioner claims to represent certain employees of the Employer.
5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
6. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time lead retail clerks (LRC) and retail thrift store clerks employed by the Employer at its Huntington and Daniels, West Virginia and its Gallipolis and The Plains, Ohio retail stores, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

## **V. DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by Retail, Wholesale and Department Store Union Local 21, United Food and Commercial Workers Union. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

### **A. VOTING ELIGIBILITY**

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

## **B. EMPLOYER TO SUBMIT LIST OF ELIGIBLE VOTERS**

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, Region 9, National Labor Relations Board, 3003 John Weld Peck Federal Building, 550 Main Street, Cincinnati, Ohio 45202-3271, on or before **November 27, 2006**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (513) 684-3946. Since the list will be made available to all parties to the election, please furnish **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

## **C. NOTICE OF POSTING OBLIGATIONS**

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

## **VI. RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **December 4, 2006**. The request may **not** be filed by facsimile.

Dated at Cincinnati, Ohio this 20<sup>th</sup> day of November 2006.

/s/ Gary W. Muffley

Gary W. Muffley, Regional Director  
Region 9, National Labor Relations Board  
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### **Classification Index**

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